WANG BANG SENG

v.

PAHANG CONSOLIDATED CO. LTD.

HIGH COURT MALAYA, KUANTAN
VC GEORGE J
[CIVIL SUIT NO. 457 OF 1977]
12 MAY 1982

TORT: *Negligence - Deceased employed as locomotive driver of a tin-mine - Death due to slash wound on throat - Whether adequate safety measures provided - Res Ipsa Loquitur - Whether there was contributory negligence - Claim for loss of dependency - Brothers and sisters of deceased, whether entitled to a claim - Section 7(2) Civil Law Act 1956.*

The plaintiff, father of the deceased, as the administrator of the estate of the deceased sued the defendants for negligence and damages on behalf of the estate and dependants of the deceased.

Wan Ah Chye the deceased was a locomotive driver of the defendant company which operated a tin-mine at Sungai Lembing, Pahang. Tin bearing rocks were extracted from about 1100 feet underground and loaded on to trucks which were then hauled by an electric locomotive from one end of a tunnel to another along a railway fine.

On 20 February 1975 while the deceased was driving the locomotive with six trucks loaded with rock a sound was heard and subsequently the train came to a stop. Later the deceased was found lying on his back wedged between the locomotive and the wall of the tunnel with a gaping wound on his throat. The steel cover of the container of the batteries of the locomotive which weighed about 20 lbs and about 3 ft. by 3 ft. with a half inch rim was found lying behind the train on the tracks. The locomotive was run by electricity supplied by some 10 batteries which were housed in a metal box in the front portion of the locomotive. The driver of the locomotive had to sit behind this metal box.

The plaintiff contended that as the locomotive went down the slope, the cover of the battery became dislodged, was flung back and cut the throat of the deceased before failing on the bricks.

He also pleaded *Res Ipsa Loquitur*. The defendants could not or refused to provide an explanation as to how this could have happened.

Held:

There was no contributory negligence.

[1] The defendants were solely to be blamed for the accident.

It was the negligence of the defendants that resulted in the accident in that they allowed the deceased to drive the locomotive without providing adequate means of safety.

[2] The brothers and sisters of the deceased were not entitled to a claim under s. 7(2) of the Civil Law Act.

[3] (a) For a loss of dependency damages was awarded at RM200.00 per month from the date of accident to the date of issue of writ amounting to RM7,200.00 and special damages of RM1,950.00, interest on both at 4% from the date of accident to date of judgment.

(b) From the date of issue of writ to date of judgment a total of RM6,400.00 was awarded and for a further period of 10 years, RM14,000.00 with 8% on the whole judgment sum.

[Defendants to pay costs to plaintiff.]

Case referred to:
Jones v. G. W. Railway [1930] 47 TLR 39

Legislation referred to:
Civil Law Act 1956, s. 7(2)

For the plaintiff - Joseph Au; M/s. Malek & Joseph Au
For the defendants - David Wong; M/s. Ten Chin Yong & Appaduray

JUDGMENT

VC George J:

During the morning of 20 February 1975 one Wan Ah Chye (hereinafter referred to as the deceased), a mining labourer employed by the defendant company, was found dead with his throat cut from the right ear up to the angle of the jaw on the left side, in a tunnel some 1100 feet underground which tunnel was part of the network of tunnels of a tin-mine at Sungai Lembing, Pahang, operated by the defendant company.

The plaintiff, the father of the deceased, as the administrator of the estate of the deceased brought the action on behalf of the estate as well as on behalf of the dependants of the deceased.

There was an agreed bundle of documents (Exhibit AB). The plaintiff gave evidence and called one Dr. A. Govind, the Medical Superintendent of the General Hospital, Kuantan who produced a post mortem report on the deceased (Exhibit P1), one Shukor bin Junoh, a mining labourer who had been working with the deceased when he met with his death and one Shamsuddin bin Abdullah, a mining gang leader (Tai Kong) under whose supervision both the deceased and Shukor had worked.

The defendants did not call any witnesses but rested their case on the contents of the agreed bundle and on the evidence led by the plaintiff.

The defendant company appeared to have carried out an investigation as to the cause of the death of the deceased and most of the documents in AB are statements taken from various employees of the defendant company in the course of that investigation.

The deceased was one of eight labourers under the Tai Kong Shamsuddin bin Abdullah working for the defendants in their tunnels some 1100 feet underground. Tin bearing rocks were extracted from the underground workings and kept in “banks” from which ran wooden chutes to a tunnel at a slightly lower level than the “banks” Along this tunnel had been laid a railway line along which an electric locomotive hauled trucks. The trucks were brought below the chutes and the loose rocks kept in ‘he “banks” above the chutes were allowed by their own weight to flow down the chutes into the trucks. When the trucks were filled the locomotive hauling the trucks was driven along the railway track down a slight decline and then up a slight gradient to another part of the tunnel some distance away where the trucks were disconnected and other empty trucks were then connected to the locomotive to be hauled back to the loading point.

The width of the locomotive was 32 inches. Its maximum speed on level ground was 3.1 m.p.h. The trucks were of less width than the locomotive.

The tunnel for the railway track appears to have been cut through rock and earth and had not only gradients and inclines but bends. The railway lines were laid on sleepers which in some areas because of soft earth or damp earth were not necessarily firmly placed. At bends and in areas where the sleepers are not firmly placed there was a tendency for the moving locomotive and the loaded trucks It was hauling to sway and even list.

The deceased's father who had worked as a locomotive driver in the mine testified that the tunnel for the railway line was so narrow that in areas the clearance between tunnel walls and the locomotive was hardly an inch. The Tai Kong, Shamsuddin testified that the width of the tunnel varies from 2 or 3 inches clearance at the narrowest points to "more than a foot' at the widest points. I preferred the Tai Kong's evidence as his experience of the tunnel was more recent than that of the deceased's father who had retired some years before the date of the death of the deceased.

Along the walls of the tunnel wooden setts were erected to keep debris from falling into the tunnel. These setts are lengths of squared timber that were vertically and firmly placed into position against both walls of the tunnel.

Inter alia, accidents could happen to the locomotive by the presence of rocks that had fallen on the railway track from the loaded trucks or even from the walls and roof of the tunnel.

Sometime in the late morning of the 20 February 1975 the Tai Kong Shamsuddin's gang took over the work at the tunnel from another gang. Before doing that Shamsuddin had satisfied himself that the railway track was free from debris.

The deceased, Wan Ah Chye, was to drive the locomotive after the six trucks it was to haul had been loaded by PW3 Shukor bin Junoh with rock that had been extracted by the other members of Shamsuddin's gang.

When the trucks had been loaded the deceased set out driving the locomotive down the slight incline at a normal speed. PW3 followed on foot. When the train (that was travelling about twice or thrice the speed of a man walking) had pulled away about 50 to 60 feet PW3 who was then about 40 feet from the last truck heard a sound described by him as "thump!". He continued to hear the "tick-tock" sound of the train travelling on. The train came to a stop about 180 feet from where it had started on its fatal journey.

The driver Wan Ah Chye was found lying on his back wedged between the locomotive and the wall of the tunnel with a gaping wound on his throat. Some distance behind the train and lying on the tracks was found the steel cover of the container of the batteries of the locomotive.

The locomotive was run by electricity supplied by some 10 batteries which are housed in a metal box that is in front portion of the locomotive. The driver of the locomotive sits behind this metal box. It was a rectangular box about 3 feet by 3 feet with a half inch rim which fits over the rectangular opening of the box - "like a rice-pot cover" is how one of the witnesses described it.

This cover weighed about 20 lbs. and was not secured to the box by any means other than its weight and the half inch rim.

The contention by the plaintiff was that, on a balance of probability, the Court should find that as the locomotive went down the slope the cover of the battery box became dislodged, was flung back and cut the throat of the deceased before falling on to the tracks where it was later found.

No other explanation being available as to how the deceased happened to have his throat cut and this explanation in all the circumstances being not improbable, I found as a fact that the cover of the battery box became dislodged and before it fell on to the railway track, its edge cut the throat of the deceased. The defendants could not or refused to provide an explanation as to how this could have happened.

In all the circumstances, clearly that could only have happened if the cover was caused to be dislodged by a force that not only dislodged it but caused it to be flung backwards with some considerable force.

The deceased's father had testified that as the locomotive moved along the tracks the cover could hit the wooden setts in the narrower parts of the tunnel. The Tai Kong had conceded that at some of the narrower parts the clearance could be as little as 2 or 3 inches. He had also testified that where the sleepers were not firmly in position the locomotive could sway and even list. PW3 Shukor had heard a "thump" sound coming from where the train was some 40 feet ahead of him.

On that evidence I think it is not a matter of mere surmise or conjecture but a reasonable deduction that the probabilities were, and I so found, that the only way in which the accident could have happened was for the battery cover of the swaying locomotive as it went down the slight gradient coming into sharp contact with one of the squared timber setts causing the cover to be dislodged and flung backwards its edge cutting the throat of the driver before failing on the tracks where it was later found.

Lord Buckmaster in *Jones v. G.W. Raitway* [1930] 47 TLR 39, 41 said:

> It is a mistake to think that because an event is unseen its cause cannot be reasonably inferred.

And if it can be so inferred the plaintiff can be said to have proved his case.

I found no difficulty in concluding that it was the negligence of the defendants that resulted in the accident in that they allowed the deceased to drive that locomotive without providing the means of securely attaching the battery cover to the box. The defendants must have or should have known that there was always present the danger of the locomotive coming to grief *inter alia* by colliding with fallen rocks and considering the narrowness of the tunnel, by coming into contact with the wooden setts. There had even been actual derailments and it seemed to me that it was sheer negligence to have a loose part on the locomotive that could be transformed in the course of the normal use of the locomotive into a lethal missile. As Counsel for the plaintiff had said, a single clamp or a couple of screws would have prevented the cover from being accidentally dislodged.

Some indication of the attitude taken by the defendant company in respect of the safety of its workers was given to me by the evidence that although the locomotive was equipped with a powerful lamp, on the day of the accident It was out of order. However, there was no evidence providing a nexus between the lack of the lamp and the occurrence of the accident.

No doubt in an abundance of caution the plaintiff has also pleaded *Res Ipsa Loquitur*. Counsel for the defendants contended that the *Res* did not speak.

Unless it was being suggested that the deceased had by his own hand cut his throat (and that was not suggested either by Counsel or by the evidence) the mere happening of the accident speaks for itself as being more consistent with negligence on the part of the defendants than with other causes and unless the defendants could give a reasonable explanation to show how the accident may have occurred without negligence on their part

the Court may and should hold the defendants liable in negligence. There might very well have been contributory negligence on the put of the deceased but no evidence suggesting even that was adduced.

In the event I found the defendants solely to blame for the accident.

As to the quantum of damages, I agree with Encik David Wong for the defendants that the brothers and sisters of the deceased were not entitled to a claim under s. 7(2) of the Civil Law Act.

I also agreed with his submission that out of the RM400.00 that the deceased handed to his father every month about half was in fact for the deceased's own use.

As any amount that I would award for loss of expectation of life would merge with the award for loss of dependency I made no award for that.

For loss of dependency I allowed at RM200.00 per month from the date of accident to the date of issue of writ (rounded off to 36 months), RM7,200.00. On this amount and on the agreed special damages of RM1,950.00 I ordered interest at 4% per annum from the date of the accident to date of judgment.

For the period after the issue of the writ I computed the loss of dependency at only RM150.00 per month as I took into account that the deceased might have got married by then and that in any event his parents' dependency would have decreased by then as the younger children might have started working themselves. I awarded for the 4 years from the date of issue of writ to date of judgment RM6,400.00 and from the date of judgment for a further period of 10 years RM14,000.00 having arrived at that amount with the use of the annuity tables.

I ordered interest on the whole judgment sum at 8% per annum. I also ordered that the defendants pay the plaintiff costs.

Also found at [1983] 1 CLJ 42